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Nos. 49 and 53

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1963

DONALD I. TILTON, WILFRED L. BECK, JR., AND GUY H. McCLEARN, JR.,

*Petitioners,*

v.

MISSOURI PACIFIC RAILROAD COMPANY,

*Respondent.*

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ROBERT C. BROOKS,

*Petitioner,*

v.

MISSOURI PACIFIC RAILROAD COMPANY,

*Respondent.*

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**On Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit**

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## BRIEF OF RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO, AS AMICUS CURIAE

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Dated at Toledo, Ohio this
8th day of October, 1963.

THE TOLEDO PRINTING CO.

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### Preliminary Statement — Interest of the Amicus Curiae.

The Railway Employes' Department, AFL-CIO, on whose behalf as *amicus curiae* this brief is filed, is composed of the following standard national and international railway labor organizations representing, for purposes of collective bargaining under the Railway Labor Act, the so-called shop-craft employees of the great majority of railroads in the United States:

International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers
Brotherhood Railway Carmen of America

International Brotherhood of Electrical Workers
International Association of Machinists
Sheet Metal Workers' International Association
International Brotherhood of Firemen, Oilers,
Helpers, Roundhouse and Railway Shop Laborers

Collective bargaining for these organizations is conducted on a federated basis by said Railway Employes' Department operating through "System Federations" on the properties of the respective carriers, agreements negotiated by such System Federations providing, among other things, for seniority systems and seniority rights of employees in the various crafts represented. In the fulfillment of its representative function the Railway Employes' Department and its System Federations are under a statutory duty to exert every reasonable effort to make and maintain such agreements and to settle all disputes with respect to their interpretation or application.

Since the enactment of the Selective Training and Service Act of 1940 and subsequent legislation establishing legally enforceable reemployment rights for persons called from private employment to perform military service, numerous questions have arisen, and a great amount of litigation has ensued, with respect to the particular job status and seniority rights to which the returning veteran is entitled. Such questions have been of particular importance in the railroad industry, with its organization of employees in separate crafts and classes, and confinement of seniority rights to crafts and sub-crafts, and particular points of employment.

Particularly fruitful of continuing litigation have been the claims of returning veterans to be promoted or transferred to positions different from those which they left to enter the armed forces, in either the same or different crafts, and to retroactive or antedated seniority

in the new positions following such promotions or transfers. Such claims, and the continuing litigation, necessarily give rise to uncertainty and insecurity, not to mention dissension, within the employee groups affected, and this situation can only be alleviated by the development of well established principles governing the application of the statutory re-employment provisions to these questionable situations.

In a number of cases in which it has participated, the Railway Employes' Department has taken the view that while the returning veteran must be restored to his former position with full accumulation of seniority credit for the period of his absence in the armed forces, the statutory provisions did not require his restoration to a new or different position, with retroactive seniority therein, simply on the theory that he could, would, or might have been able to obtain such position had he not been absent. Such view was followed by the lower Federal courts with almost complete unanimity until this Court's *per curiam* reversal of the decision of the Court of Appeals for the Third Circuit in *Diehl v. Lehigh Valley R. Co.*, 348 U. S. 960. Though we do not agree that it warrants such construction, the *Diehl* decision has been interpreted by Government counsel representing the returned veterans as a reversal of this previous line of cases, and a resurgence of litigation on this question followed, with resultant conflicting decisions of the courts.

We had felt that these doubts were resolved by the Court's opinion in *McKinney v. Missouri-Kansas-Texas R. Co.*, 357 U. S. 263, which appeared to limit the veteran's right to retroactive promotions and seniority status to those situations where the advancement would have accrued to him automatically, as of right, by virtue of his seniority, and to hold that he was not entitled to claim

those changes or advancements in status that he could have achieved only by "experience, effort or chance," or subject to the exercise of managerial discretion. However, the statement of the "Question Presented" in the brief for petitioners herein is substantially indistinguishable from that of Government counsel representing petitioner in the *McKinney* case. The Railway Employes' Department, as collective bargaining representative of both veteran and non-veteran railroad employees, is vitally interested in avoiding continued uncertainty and relitigation of these issues, and the accompanying disruptive effect upon contractual seniority systems whose primary purpose is to afford job security for the people it represents.

## ARGUMENT

Section 9 of the Universal Military Training and Service Act (62 Stat. 614, as amended, 50 U.S.C. 459), upon which this action is based, requires that a veteran who had left a position, other than temporary, in the employ of a private employer, must be restored "to such position or to a position of like seniority, status and pay" (Sec. 9 (b) (B) (i)); and that he "shall be considered as having been on furlough or leave of absence" and "shall be so restored without loss of seniority" (Sec. 9 (c) (1)). The same provisions were contained in the Selective Training and Service Act of 1940 (50 U.S.C. App., Sec. 301 et seq.), and subsequently enacted statutes conferring reemployment rights upon veterans.

Applying these requirements to situations like the instant cases, where the veteran is asserting the right to a different or promoted position rather than the one which he left to enter the armed forces, it is our position that he is entitled to the changed or improved status or job only where the right to obtain it would have accrued to him

automatically, as an attribute of his statutorily protected seniority in his old job, had he not entered the armed forces. This seems to us to be the clear meaning of this Court's discussion, in the *McKinney* case, *supra*, of the requirement of restoration "without loss of seniority" — the specific statutory mandate upon which the action was based, and of which the Court said Section 9 (c) (2) of the present Act was an interpretation.

The latter section, added to the statute at the time of adoption of the Selective Service Act of 1948 (62 Stat. 604, 50 U.S.C. App., Sec. 451 et seq.), recites that "It is hereby declared to be the sense of the Congress" that the veteran "should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment". That this language was intended to relate to the previously protected "seniority" of the veteran is confirmed by the statement in the *McKinney* opinion that it was simply the statutory embodiment of the Court's innterpretation in previous decisions of the meaning of the phrase "without loss of seniority". As such, we submit that it does not support a claim to a superior status which the veteran could not have achieved automatically by virtue of his seniority.

Government counsel representing veterans in these and many other cases have consistently sought to attribute a much broader scope to the concept of "continuous employment" embodied in the interpretation, so as to entitle the veteran to all improvements in his status which he could or probably would have been able to obtain by remaining at work on the job. Many promotions or changes in job classifications can of course be achieved only by

completion of a prescribed course of study or training, or the fulfillment of minimum experience requirements. While Government counsel no longer insist, as they did in some of the earlier cases, that time spent in the armed forces must be considered, for purposes of fulfilling such qualification requirements, as time actually worked on the job, they do urge that *after* the returned veteran has completed the necessary working time of course of training, *then* his time in the armed forces must be considered as time on the job, so as to afford him retroactive, statutory "bumping" rights to displace others who had been promoted ahead of him.

This latter position is certainly inconsistent with the argument that "continuous employment" as used in the statute relates to anything but the seniority attributes of the position left by the veteran; for there is nothing in the statute which would authorize deferring the restoration of the veteran to the promoted position if he were entitled to it. But this Court has clearly indicated that the phrase "continuous employment" was not meant to be equated with actual work on the job, but included the concept of an employee on furlough or leave of absence. *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U. S. 275.

The position urged on behalf of the petitioners is further completely inconsistent with the continued presence in Section 9 (c) (1) of the requirement that the veteran "shall be considered as having been on furlough or leave of absence". If continuous employment is to be related to anything but seniority and its attributes, then the quoted phrase is completely without meaning or effect.

That such was not the intent of Congress is apparent, we believe, from the legislative history of Section 9 (c) (2), as well as the care with which the final version was drafted

to avoid conveying the impression that it was intended to create any rights different, or separately enforceable, from the mandates contained in Section 9 (c) (1). These points have been thoroughly developed in the briefs of respondents herein, which also contain extensive citation and discussion of the leading cases in the great body of litigation relating to the issues involved here, and we shall not burden the Court with duplication of arguments already before it.

As noted in our preliminary statement, the present cases appear to us to be an attempt to relitigate issues already decided by this Court in *McKinney v. Missouri-Kansas-Texas R. Co.*, 357 U. S. 263. The opinion in that case plainly limits the veteran's right to demand a different or higher position than that which he left, to situations where promotion to that position would have depended "simply on seniority or some other form of automatic progression." And the Court expressly stated that the veteran could not claim what "might have flowed from experience, effort or chance". The fact that in that case the factor which militated against the veteran's claim was the existence of discretion on the part of the employer, so that promotions were based in part at least upon the exercise of judgment as to the employee's relative merit and ability, does not narrow the scope of the Court's decision, and its treatment of Section 9 (c) (2) of the Act as an interpretation of the phrase "without loss of seniority" in Section 9 (c) (1).

We do not understand that petitioners in these cases are disputing the existence of *bona fide* requirements of a specific amount of actual working experience, or completion of a prescribed course of apprentice training, as a condition of qualifying for the promoted positions in question. In such a situation "experience" and "effort" clearly are

mandatory factors in the achievement of the promotion, irrespective of the existence of other speculative factors relied on by the court below and discussed by the parties here. And whether viewed as a matter of foresight or hindsight, it is apparent that these promotions were not to be achieved simply on the basis of "seniority or some other form of automatic progression."

## CONCLUSION

The statutory requirements with respect to reemployment of veterans impose, in a sense, a private burden for public service. Praiseworthy though it may be to protect the veteran's right to return to his job, and without having to start again at the bottom of the seniority ladder, this objective normally is achieved only at the expense of loss of employment by a junior employee. This is particularly true in the railroad industry which for years has been drastically reducing its forces rather than hiring new employees.

It is thus vitally important to the employees in a particular seniority group to be able to know whether, and to what extent, their continued future employment might be affected by the return of employees shown on the seniority roster as being on leave of absence in the armed forces. Should the viewpoint urged on behalf of petitioners here prevail, the insecurity of such a position, and the problems of appraising future prospects, would be vastly multiplied. For the reasons stated herein, we believe that Congress wisely refrained from attempting to guarantee to the returning veteran a retroactive reconstruction of a hypothetical civilian employment that would

have such widespread disruptive effects for employers and other employees.

Respectfully submitted,

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Dated at Toledo, Ohio this 8th day of October, 1963.

## CERTIFICATE OF SERVICE

I, Richard R. Lyman, one of the attorneys for the Railway Employes' Department, AFL-CIO, amicus curiae, do hereby certify that on the 8th day of October, 1963, I served the attached brief of amicus curiae upon all parties of record herein by depositing copies hereof in the United States mails, via airmail, postage prepaid, addressed to Archibald Cox, Esq., Solicitor General; John W. Douglas, Esq., Assistant Attorney General; Alan S. Rosenthal, Esq., and Richard S. Salzman, Esq., Department of Justice, Washington, D. C., 20530, attorneys for petitioners; Herschel H. Friday, Esq., and Robert V. Light, Esq., attorneys for respondent, Missouri Pacific Railroad Company; and to Robert W. Yost, attorney for respondent, Missouri Pacific Railroad Company, 2008 Missouri Pacific Building, St. Louis, Missouri, 63103.

Richard R. Lyman